RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN VARIOUS FOREIGN COUNTRIES

Dr. George J. Roman

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CONTENTS

I. INTRODUCTION

The civil and commercial judgments rendered by courts have a strict territorial effect. As a rule, they are not enforced in another country unless the judgment fulfills certain conditions required by the laws in regard to the recognition and enforcement of foreign judgments.

Historically the individual peculiarities and special national interests of Europe have generated a diversity of methods and solutions in this matter. In principle it is up to the country of the law of recognition to determine the effects and efficacy of a foreign judgment submitted to its courts for enforcement. Therefore, the value and the effects of these judgments in every jurisdiction could be considered as simple facts or means of proof for a new action before the court of recognition up to a res judicata decision fulfilling the forum's conditions for both recognition and enforcement. Moreover, the laws of some countries do not require recognition of certain types of foreign judgments which either do not involve or directly concern money or other property. In these cases, however, each country has rules or judiciary practices regarding foreign recognition decisions.

In relation to the power of the court of recognition to accept, reject, scrutinize, or interfere with the contents of a foreign judgment, the following approaches have been adopted in Europe.

A. Rejection of the Recognition Concept

There are countries which, unless they are bound by an international agreement, do not recognize any executory effect or possibility of enforcing a foreign judgment. As a consequence, in such a case the foreign claimant has no other alternative but to initiate another action before the competent court of the respective jurisdiction.

B. Review of a Judgment on Its Merits

The court of recognition has a duty to scrutinize the foreign judgment, not only as to law and procedure, but the court considers its completeness, the factual aspects, and decides whether or not the judgment's content is acceptable. If the court finds such action necessary, the foreign decision may be reviewed or rejected in full or in part. If the judgment is partially rejected or modified in some way, the foreign decision is enforced in the country of recognition only in the reviewed form or in the form accepted by the court of recognition.

C. Full Review of a Judgment

The court of recognition undertakes full review of a foreign judgment and may grant or deny it recognition.

D. Limited Review of a Judgment

The method adopted over most of Europe is based on a limited power of the court of recognition to review a foreign judgment submitted for enforcement. It is usually scrutinized regarding the fulfillment of certain conditions expressly provided by the law of the recognition forum or contained in its leading cases.

II. RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN WESTERN EUROPE

During the post-World War II period, cooperation in the field of recognition and enforcement of foreign judgments has characterized the activity of Western Europe. Strong support for this cooperation has come from the organized activities of the Council of Europe, The Hague Conference of Private International Law, and the European Economic Communities. For instance, during the last 35 years The Hague Conference of Private International Law has drafted excellent texts for international agreements in almost every field of private law. In matters concerning the recognition and

enforcement of foreign judgments, the following international instruments are of a particular importance: The Convention on the Recognition and Enforcement of Judgments in Matters of Maintenance Obligations with Respect of Children (1958); 1/ The Convention on Jurisdiction, Applicable Law and Recognition of Decrees Relating to Adoption (1965); 2/ The Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (1971); 3/ The Convention on the Recognition of Divorce and Legal Separation (1970); 4/ The Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations (1973); 5/ and finally, The Convention on Celebration and Recognition of the Validity of Marriages (1976). 6/ The European Economic Community also adopted its own Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (1978). 7/

The increase in cooperation in this field has been supported by a change in the conditions of reciprocity which have been modified and have taken on a less stringent form. In the past, reciprocity was demanded by the European countries as a prerequisite for granting enforcement to foreign

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1/ Bureau Permanent de la Conférence de La Haye de droit international privé, edit., Recueil des Conventions (1951-1977) 36 (La Haye, L'Imprimerie nationale des Pays-Bas, 1978).

2/ Id. at 64.

3/ Id. at 106.

4/ Id. at 28.

5/ Id. at 202.

6/ Id. at 242.

7/ 21 Official Journal of the European Communities No. L 304 (1978).

judgments. Today, however, among all the western countries examined in this study, only the Federal Republic of Germany and some isolated Swiss cantonal courts still currently require reciprocity in this field.

Some limitations, however, remain. The fact that the EEC Draft Convention on Recognition and Enforcement of Judgments was ratified and became the general instrument in this matter is certainly proof of such a limitation. The Hague Draft Convention would have had a larger field of application.

The absence of a general international instrument in this matter has a negative influence on transcontinental cooperation. The bilateral agreements are left with the role of regulating this kind of cooperation. Unfortunately, these agreements, in turn, generate a lack of uniformity, multiply the regulations, and are a burden to the security of transnational cooperation. It is also significant that the United States has not concluded such bilateral agreements with any continental European country.

A. FRANCE

1. Legal Sources

French legislation offers few regulations in the field of enforcement of foreign judgments. Article 509 of the New Code of Civil Procedure provides that the "judgments rendered by foreign courts and the documents received by the foreign agents are executory in the territory of the Republic in the manner and in the cases prescribed by law." 8/ For instance, article 2123 of the Civil Code provides that a mortgage, by order of the court, may also originate from judiciary decisions rendered in foreign countries

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8/ F. Grivart de Kerstrat and W.E. Crawford, trans., 1 New Code of Civil Procedure in France (Dobbs Ferry, New York, 1978).

and, in turn, may be declared executory by a French court. 9/ In the absence of more detailed legislation, the French courts, particularly the Cour de Cassation, have been forced to develop a complex practice of jurisprudence which currently serves as a basic legal orientation in matters of foreign judgments.

Before 1964, the practice of the French courts was based on the method of reviewing the foreign judgments on their merits. The courts had the power either to reject or to modify a foreign judgment which did not fulfill the requirements for recognition. In a 1964 decision rendered in Munzer v. Dame Munzer, 10/ the Cour de Cassation replaced the practice of reviewing foreign judgments on their merits with a review of their regularity as to form and procedure. In practice, this meant that the court could scrutinize whether or not the judgment fulfilled certain conditions. Now, if the foreign decision does not meet these conditions, the judge can refuse to grant recognition, but he no longer has the power to review the decision on its merits and change its contents.

2. Requirements of Recognition

The present court practice necessitated by the Munzer decision and amended by the Bachir decision, 11/ requires a French judge to be certain that the following requirements have been fulfilled by the foreign court before he grants recognition:

- it must have jurisdiction over the case;

9/ Petits Codes Dalloz, Code Civil, 78ième éd. (Paris, Jurisprudence Générale Dalloz, 1978-1979).

10/ Juris-classeur périodique [J.C.P.] 1964, 13590, note Ancel.

11/ Dalloz jurisprudence 1968, at 95, note Mezger.

- it must have applied the proper law, in terms of French rules of conflict of laws;

- its decision must not be contrary to public international order; and

- the decision must be devoid of fraud.

The verification of a foreign judgment through these four requirements is, in terms of the Cour de Cassation, adequate to protect the legal order and interests of France. This protection is the object of the institution of recognition. 12/ The court said that this verification "constitutes the expression and at the same time the limits of power of review of the judge in charge of making a foreign judgment executory in France." 13/

Jurisdiction of the Foreign Court. The Munzer decision provides that only those foreign judgments rendered by competent courts are enforceable in France. Thus, the problem is to know whether this jurisdiction must be scrutinized according to French rules or according to the rules of jurisdiction of the foreign court, the court which rendered the decision in question. The French court practice makes a distinction between the international jurisdiction, also called general jurisdiction, and the internal jurisdiction or special jurisdiction. The French judge is obliged to scrutinize both aspects of jurisdiction before he grants recognition to a foreign judgment.

International Jurisdiction. French scholars explain this review of the foreign court's jurisdiction through the concept that a court which rendered a decision submitted for recognition in France declares itself

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12/ Supra note 10.

13/ Id.

competent according to its own rules of international jurisdiction. Usually the other country's rules are disregarded in this matter. 14/ Therefore, it is quite normal that the French court of recognition must verify whether or not the French rules of international jurisdiction were violated. In these cases the French courts exercise an indirect jurisdiction over the respective case. 15/ They usually refuse to grant recognition to those decisions in which the French rules of international jurisdiction providing for the exclusive jurisdiction of French courts were ignored or violated. 16/ A typical case arises if the provisions of articles 14 and 15 of the French Civil Code are ignored. These cases give French citizens the privilege of an extensive jurisdiction in their national courts irrespective of whether they act as plaintiffs or defendants in a suit with a foreign party with the following exceptions:

- when French citizens have renounced these privileges before a foreign court;
- when the judicial action concerns immovable property or the legal means of execution;

14/ D. Holleaux, Compétence du juge étranger et reconnaissance des jugements 10 (Paris, Dalloz, 1970).

15/ H. Batiffol, 2 Droit international privé, avec le concours de P. Lagarde, 427-428 (Paris, Librairie générale de droit et de jurisprudence, 1971); see also, Y. Loussouarn and P. Bourel, Droit international privé 625 (Paris, Dalloz, 1980).

16/ Cour de Cassation, Civ. May 5, 1962, Dalloz jurisprudence 1962, 718 note G. Holleaux; see also, Revue critique de droit international privé 99 (1963).

- when such a case has been expressly excepted by French international agreements. 17/

Other rules of exclusive jurisdiction, such as those regarding immovable property situated in France, require the foreign claimant to submit to the jurisdiction of the French courts under the possible penalty that the foreign decision will be denied recognition.

Finally, some scholars also envisage exclusive jurisdiction in cases when the parties, by their own initiative, have avoided the French general rule of jurisdiction based on the defendant's domicile (art. 42, New Code of Civil Procedure) by choosing another forum. Conversely, these scholars also envisage exclusive jurisdiction in cases when the parties selected a French court by avoiding a foreign court in a matter which is generally under its jurisdiction. 18/

Internal Jurisdiction of the Foreign Court. The French court of recognition must make certain that the foreign judge had internal jurisdiction in accordance with his country's rule of jurisdiction. Doubts arise in cases in which the French judge is likely to be better suited than the foreign judge himself to make this determination. Some French scholars question the legitimacy of such verification "by which the French judge of recognition gives a lesson to the foreign judge by checking whether or not the latter correctly applied the foreign rules of internal jurisdiction, rules about which he has, without any doubt, a knowledge infinitely superior

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17/ D. Alexandre, "L'exequatur des jugements et sentences," in Etudes de droit contemporain (nouvelle série), VIIIe Congrès International de Droit Comparé, Pescara, 1970, at 129 (Paris, Les Editions de l'Epargne, 1971).

18/ Id. at 130; supra note 15, Batiffol, at 478; Loussouarn, at 627-628.

to that which can be possessed by his French colleague." 19/ Since the Cour de Cassation in the Bachir decision stated that the regularity of the procedure "must be evaluated only as to the French public international order and to the right of defense," 20/ some scholars have reached the conclusion that the old practice of verifying the regularity of domestic procedure became unnecessary. 21/

Law Applied by the Foreign Court. In the Munzer decision, the Cour de Cassation expressly asked the courts to verify, according to the French rule of conflict of laws, the application of the competent law by the foreign court. 22/ This means that before granting recognition, a judge has to review the entire case and determine whether the foreign court's initial characterization and determination of applicable law are in concordance with French conflict rules. Since the foreign court's characterization is always made according to its own country's legal concepts, the requirement of the highest court in France is considered by some scholars very rigorous. 23/ Other scholars, however, defend the position of the Cour de Cassation on the ground that "French jurisprudence does not claim to impose French private international law on the foreign judge, but French jurisprudence simply refuses to permit the operation of foreign private international law in France in order

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19/ Supra note 15, Loussouarn, at 629; supra note 17, at 130.

20/ Cour de Cassation, Civ., December 4, 1967 (Bachir Case), Dalloz jurisprudence 1968, 95, note Metzger; see also J.C.P. 1968.II.15634, note Sialeli.

21/ Supra note 17, at 131.

22/ Supra note 10.

23/ Supra note 15, Loussouarn, at 629.

to avoid fraud and uncertainty in this matter." 24/ The French courts usually lessen the severity of this rule by applying the concept of équivalence. According to this concept, recognition will be granted when the foreign judgment is the same in its outcome as if the French conflict rule had been applied.

International Public Order. Since the Munzer and Bachir cases, the French courts have reviewed foreign decisions in both their procedural and substantive aspects.

a. The review of the procedural public order in terms of the Bachir decision consists of the duty of a French judge to ascertain "whether the procedural requirements of the law suit in the foreign jurisdiction were complied with." As the decision emphasizes, "regularity must be evaluated with respect to French public order and to rights of the defense." 25/ The public order is violated when the defendant was not properly summoned 26/ or was not properly represented, 27/ or when certain proof presented by the plaintiff was admitted by the court in breach of its rules of procedure. 28/ The fact that the foreign decision does not state the reasons on which the decision was based does not constitute a matter of public order. 29/

24/ Supra note 15, Batiffol, at 493.

25/ J.C.P. 1968.II.15634, note Sialeli.

26/ Revue critique de droit international privé 397 (1961).

27/ Cour de Cassation, Req. January 10, 1928, Journal du Droit International 975 (1928).

28/ Cour de Cassation, Civ., January 22, 1951, J.C.P. 1951.II.6151, note Sarrate and Tagle.

29/ Cour de Cassation, Civ., July 11, 1961, Dalloz jurisprudence 1961, 577, note Holleaux.

b. The review of substantive law aspects of public order means their review by French private international law. The purpose of the review is not to create a new right in France but rather to permit a right obtained without fraud in a foreign country to take effect within French territory. 30/

Legal Fraud. In French law, legal fraud occurs when one or both of the interested parties have modified the legal relation which was the object of litigation with the intent of withdrawing the case either from the applicability of a certain law or from the jurisdiction of a competent court.

In order to replace a law otherwise applicable with another law, a fraudulent modification is necessary in the connecting factor of the respective legal relation, i.e., the nationality or domicile of the interested person or persons, since this factor is usually determined in the characterization of that legal relation. Once the characterization has been changed, the conflict rule is applied automatically to this relation and the desired result is obtained.

In matters of jurisdiction, fraud usually is committed by shopping for a suitable forum. Another way in which one may commit legal fraud is by changing the connecting factor of a legal relation. For example, the domicile of a person may be changed in order to obtain the desired jurisdiction.

Recognition Procedure. The French rules of jurisdiction and procedure are applicable to the enforcement of a foreign judgment.

The action for recognition must be brought in the proper tribunal de grande instance.

30/ Supra note 17, at 135.

Territorial jurisdiction is determined by the ordinary rules of procedure which, in principle, provide for the jurisdiction of the tribunal de grande instance at the defendant's domicile or residence. When the defendant has no domicile or residence in France, the request for recognition can be brought in this court at the place of execution or in any other court chosen without fraud by the claimant, including the Tribunal de Grande Instance de Paris. 31/

Since the hearing on the recognition of the foreign judgment takes place in adversary proceedings, the request for recognition must be formulated before the court by way of summoning the defendant and giving him the right to exercise his procedural defense. Finally, the claimant has to submit a certified copy of the foreign judgment bearing the executory formula and its official translation to the court.

Foreign Judgments in Matters of Personal Status and Capacity. The French courts usually recognize, without any other procedure or formality, two legal effects concerning all foreign judgments. First, the judgment is a fact and, therefore, can serve as just cause in a new claim or action in justice; second, as written documents, such judgments can be used as means of proof, although in this capacity they are limited to a simple testimonial value. 32/

The French courts also recognize that foreign judgments on the status and capacity of a person (constitutive judgments), particularly those on divorce, have a legal effect in France without recognition whenever they do not require a coercive measure against a person or execution against

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31/ Id. at 120.

32/ Id. at 124.

property; however, even in this particular case, they have to be examined as to their regularity in order to determine whether or not any rights of defense were violated. 33/ For example, a foreign decision concerning divorce has the legal effect of permitting the former spouses to contract a new marriage without the necessity for recognition in the French courts. 34/ However, whenever a measure of execution based on this foreign judgment becomes necessary, that is, the recognition and enforcement of child support, then recognition is required. 35/

Foreign judgments concerning the status and capacity of a person cannot have a direct or a de plano legal effect when they are contested by an interested person. Therefore, in order to produce this legal effect, it is necessary to submit these judgments to a French court which is competent to review them. This review consists of a verification as to whether or not they fulfill the conditions required by the Cour de Cassation in Munzer- and Bachir-type cases, and whether or not the judgment has the effect of res judicata. In practice this review can take place as an incidental matter, i.e., during the hearing of a case involving another matter, and in which a party invokes the foreign judgment on the status or capacity of a person to be accepted as such. It also can take place as a special preventive action in which the claimant wants to establish the regularity of a foreign decision in a French court. Consequently, it may be challenged by a third person. 36/

33/ Cour de Cassation, Civ. December 19, 1972, Revue critique de droit international privé 83 (1975), note Holleaux.

34/ J. Derruppe, Droit international privé 116 (Paris, Dalloz, 1980).

35/ Id.

36/ Cour d'Appel de Paris 1967, Revue critique de droit international privé 293 (1970).

Finally, it can also take place as a separate action when an interested person asks the court to have the foreign judgment declared null and void in France because of an irregularity. 37/

B. BELGIUM

1. Legal Sources

Articles 570 and 635, paragraph 7, of the Judiciary Code of 1967 are the only sources regarding the enforcement of judgments in Belgium. The Cour de Cassation has, however, filled this gap with its decisions.

Similarly to the French judiciary practice, reciprocity between Belgium and foreign countries is not required for the enforcement of foreign judgments. In examining a foreign judgment, the Belgian judge cannot assume the authority of the foreign judge. "He can grant or refuse recognition, but he cannot modify the foreign judgments. New demands are not acceptable. At the same time, the Belgian judge can grant a partial recognition." 38/ As the Brussels Civil Court stated:

> After examination of all the main claims which initially were submitted to the foreign court and all the legal and factual circumstances which determined the decision of the court, the Belgian court grants or refuses, in full or part, the recognition without, in substance, having the power to substitute its own decision for that of the foreign court. 39/

37/ Supra note 17, at 125.

38/ J. Baugniet and M. Weser, "L'exequatur des jugements, des sentences et des actes authentiques," in Rapports belges au VIIIe Congrès international de droit comparé 203 (Bruxelles, 1970).

39/ Cour Civile de Bruxelles, February 18, 1939, Pasicrisie belge 1939, III, 155; see also Cour Civile de Bruxelles (9e Chambre), March 6, 1970, in the case S.A.R.L. de Droit Français Grosslambert v. Madame Veuve Eugène Hunier, Journal des Tribunaux 298 (1970).

There are two important areas in which the Belgian law and judiciary practice do not follow French practice. First, the Belgian judge is not obliged to verify whether the foreign court which rendered the decision had international jurisdiction according to Belgian law. Second, the judge is not obligated to verify according to Belgian rules of conflict of laws whether the foreign judge applied the proper law to the substance of the respective case, except in cases involving matters of the status and capacity of Belgian citizens. In these matters the Belgian court of recognition always ascertains whether or not the Belgian law was applied. In French practice this review was extended, after the Munzer case, from the decisions concerning the status and capacity of persons to all types of judgments submitted to the French courts of recognition. 40/

2. Requirements for Recognition

In the absence of a treaty between Belgium and the country where the decision was rendered, article 570 of the Judiciary Code requires that a foreign judgment comply with the following conditions in order to obtain recognition in Belgium:

Public Order and Public Law. A foreign judgment is not enforced if its effects are contrary eitner to the Belgian principles of public order (public policy) or to its rules of public law. For example, in the Vigouroux case of May 4, 1950, the Cour de Cassation explained that a law of domestic (internal) public order is not automatically of Belgian international public order. To be recognized as such, it is necessary that the domestic public

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40/ Ph. Francescakis and H.J. Lucas, "Jugement étranger," in Dalloz, Répertoire de droit international, No. 24 (Paris, Dalloz, 1969).

order law contain a certain principle which in the eyes of the Belgian legislature is essential to the established Belgian moral, political, or economic order. 41/ Therefore, a foreign law contrary to such essential principles and a foreign court decision rendered on such a law cannot be applied or recognized in Belgium. 42/

In practice, the public international order is, for the most part, invoked in decisions regarding the status and capacity of persons. 43/ The practice of Belgian courts to refuse recognition to foreign judgments concerning the status and capacity of Belgian nationals for reasons of public order whenever these decisions are not based on Belgian law must be considered in the same light. As Mercier concludes, in such cases "it is a subversion of the concept of public order when the judiciary practice imposes Belgian law upon the foreign judge when this judge decides on the status and capacity of Belgian nationals." 44/

Right of Defense. Recognition is refused if the procedural rights of the defendant were violated by the judgment. This condition, which in French practice was included in the public order condition, is currently required all over Europe. The scope of the right of defense is decided according to Belgian standards. 45/

41/ Supra note 38, at 203.

42/ Id.

43/ Id.

44/ P. Mercier, Effets internationaux des jugements dans les Etats du Marché Commun 114 (Genève, Droz, 1965).

45/ F. Rigaux, 2 Droit international privé 193 (Bruxelles, Larcier, 1979).

Lack of Jurisdiction of the Foreign Court. Article 570 of the Judiciary Code does not give the judge of recognition the power to verify whether or not the foreign court had jurisdiction over a case. However, paragraph 3 of this article obliges the judge to ascertain whether the foreign court does not hold exclusive jurisdiction by reason of nationality. This has the purpose of preventing the enforcement in Belgium of French and Luxemburg court decisions lacking jurisdiction (arts. 14 and 15 of the respective Civil Code).

Executory Character of a Foreign Judgment. Article 570, paragraph 4, requires that the foreign judgment must be final and executory, i.e., res judicata. This final and executory character is verified according to the procedural law of the country where the decision was rendered. The Belgian courts of recognition allow a wide interpretation of this requirement. In the past this latitude was provided for in the Law of March 25, 1876, and today it is permitted by the Judiciary Code. Thus, while in some recognition decisions the Belgian courts demand that the foreign judgment is executory in the country of origin, in others the Belgian court of recognition requires only that the foreign decision cannot be appealed further. 46/

Authenticity of Foreign Judgments. In terms of article 570, paragraph 5, of the Judiciary Code, the Belgian judge must verify whether the foreign judgment submitted to recognition is authentic. This authenticity is ascertained by applying the law of the country where the respective decision was rendered.

46/ Supra note 38, at 206.

Matters of Status and Capacity of Persons. In the absence of an express provision in this matter, the Cour de Cassation stated in a 1973 decision that foreign judgments regarding the status and capacity of persons, including those holding Belgian citizenship, will be considered to have the authority of res judicata even in relation to third persons if the judgment satisfies the conditions provided by article 570 of the Judiciary Code. 47/ This solution is similar to that followed by French judiciary practice.

Jurisdiction and Procedure. The civil court of the first degree of jurisdiction is always competent to decide on requests for granting recognition. The appeal against this decision falls within the jurisdiction of the court of the second grade of jurisdiction and can lead to a recours before the Belgian Cour de Cassation.

The demand for recognition is made in a writ of summons between the same parties as in the foreign judgment. 48/

In the absence of an international agreement between Belgium and the country where the foreign decision was rendered, the Belgian defendant can request that the foreign claimant make a deposit of a fixed amount of money as security to cover expenses and damages which he may be ordered to pay. 49/

47/ Delontaine v. Lemarge, Cour de Cassation, March 29, 1973, Pasicrisie belge [1973], I, 726-742.

48/ Supra note 44, at 50.

49/ Cour de Cassation, October 4, 1965, Journal des Tribunaux 148 (1966).

C. FEDERAL REPUBLIC OF GERMANY

1. Legal Sources

The Code of Civil Procedure as published on September 12, 1950, 50/ and the Law of August 11, 1961, Amending the Family Legislation 51/ are the legal sources in the field of enforcement of foreign judgments in the Federal Republic. The German courts, by a creative interpretation and application of these regulations, currently offer a coherent concept of recognition. In matters concerning voluntary jurisdiction, in the absence of a regulation, the courts may apply the provisions of section 328 of the Code of Civil Procedure mutatis mutandis, without, however, taking reciprocity into consideration.

Unlike the French, Belgian, Italian, and Dutch practices which do not make reciprocity a condition for recognition, German law requires reciprocity with other countries as one of the prerequisites of granting recognition and enforcement to foreign judgments in Germany. 52/ This requirement limits the enforcement of these decisions and, therefore, sometimes constitutes an obstacle to international legal relations. 53/ An exception from the obligation of reciprocity is, however, admitted where the claim does not concern property and the party does not have standing in Germany according to German law or when the case deals with affiliation. 54/

50/ Bundesgesetzblatt, at 533 [BGBl., official law gazette of the Federal Republic of Germany].

51/ BGBl., I, 1221.

52/ Section 3228(5) Zivilprozessordnung [ZPO].

53/ Entscheidungen des Bundesgerichtshofs [BGHZ] (in Zivilsachen) 42,197.

54/ G. Beitzke, "Reconnaissance et exécution des décisions judiciaires étrangères dans la République Fédérale d'Allemagne," 7 Rivista di Diritto Internazionale Privato e Processuale 242 (1971); see also ZPO, sec. 328(5).

Currently, the German courts apply the requirement of reciprocity by examining each judgment individually. As some scholars have observed, a foreign judgment is recognized if a German judgment of the same kind and content would be recognized in the country of its origin. Thus, reciprocity is divisible. The concept depends on the fact that similar judgments are recognized in principle. 55/ However, the German courts do not assure reciprocity to the courts of those countries which in their recognition procedure apply the method of review of German court decisions as to their merits, since such review is not known in German law. 56/ Similarly, German courts deny reciprocity and recognition of decisions to those foreign courts which examine, according to their own rules of procedure, whether or not the German courts were competent to render the decision submitted to them for recognition. However, if review is formally provided by German law without being carried out in practice, the German courts ignore this legal provision and reciprocity is accepted. 57/ In practice, therefore, the requirements are less rigorous. Thus, it is not necessary to prove that the German decisions are recognized effectively in the other country, but rather that this country has a system of recognition and enforcement, and that it can be expected that these provisions will be applied. 58/

55/ Id. at 243.

56/ BGHZ, 50,101.

57/ Supra note 54, at 243.

58/ BGHZ, 22, 24, 42, 206.

Finally, reciprocity is not required in cases based on noncontentious jurisdiction. 59/

2. Requirements of Recognition

In German law, more than in the laws and judiciary practice in Belgium and France, there is a very clear distinction between the recognition and the enforcement of a judgment. Recognition usually takes place de jure, if the conditions of regularity required by the law are satisfied. On the other hand, it is also possible to obtain such recognition at the request of an interested party. Such a decision has a declaratory effect, and the foreign judgment is recognized retroactively from the moment it became a res judicata in the respective foreign country. 60/

The enforcement of a judgment, however, can never take place if it is not formally ordered by the judge. 61/ This means that a foreign decision can be enforced only after it was declared executory by a recognition judgment, 62/ and recognition is granted without any re-examination of the substance of the foreign decision. However, the court cannot grant recognition unless it verifies that the judgment became final (res judicata) according to the law of the forum country and that the provisions provided by article 328 of the Code of Civil Procedure are fulfilled. In addition to reciprocity, article 328 provides that recognition is not granted:

-- when according to German legal principles, the foreign court had no jurisdiction to decide the case;

59/ Supra note 54, at 245.

60/ Id. at 263.

61/ Supra note 44, at 123.

62/ ZPO, sec. 722(I).

-- when the defendant, a German citizen, did not appear in the proceedings because a notice of the proceedings was not served on him either personally in the country where the court hearings took place or through the channels of judiciary assistance;

-- when its contents deviate from or ignore German principles of private international law to the detriment of a German party; or

-- when the recognition of the judgment is contrary to good morals or the purpose of German law.

In matters concerning marriage and divorce, the courts apply special rules for recognition provided by section 7 of the Family Law Act Amendment of August 11, 1961. 63/

Jurisdiction and Procedure. Two kinds of jurisdiction usually dominate the matter of enforcement of foreign judgments: ratione materiae and ratione loci.

Jurisdiction as to subject matter is established by the general rules and principles of German civil procedure. Thus, the courts of the first grade of jurisdiction are competent to render decisions of enforcement of a foreign judgment. According to law, these courts have the power to decide in cases concerning a value of no more than 3,000 German marks.

Territorial jurisdiction is vested in both the court of the debtor's domicile (auctor sequitur forum rei), as well as in the court of the place where his property is situated (lex rei sitae).

63/ BGBl., 1961, I, p. 1221.

The Code of Civil Procedure does not have any special rules concerning the form or formality for recognition and enforcement of foreign judgments. 64/

D. ITALY

1. Legal Sources

The basic sources for Italian recognition and enforcement of foreign judgments are found in articles 796-801 of the Code of Civil Procedure.

As in most Western European countries, Italian law does not require reciprocity as a condition for the enforcement of a foreign judgment. On the other hand, the foreign judgment has no effect and is not enforceable in Italy until it has been validated (dichiarazione di efficacia) by means of a special procedure called giudizio di delibazione. This validation is done at the request of the interested party and in the presence of the public prosecutor. 65/

2. Requirements of Recognition

In terms of the law, the validation procedure consists of verifying whether the foreign judgment fulfills the following conditions:

Jurisdiction. According to Italian rules of jurisdiction, the foreign court must have had jurisdiction. The law, however, does not define the term jurisdiction. For example, does it mean that an Italian defendant

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64/ Supra note 54, at 249.

65/ Council of Europe, The Practical Guide to the Recognition and Enforcement of Foreign Judicial Decisions in Civil and Commercial Law (Strasbourg, 1975).

cannot successfully challenge recognition on the ground that the foreign court violated a rule of its own procedure? In what case would the foreign court annul its decision if it had known that it lacked jurisdiction?

The Italian rules of international jurisdiction appear in articles 2-5 of the Code of Civil Procedure and can be summarized as follows:

One, when the litigant accepts the jurisdiction of the court of the residence or domicile of the defendant (his chosen domicile) directly or through his authorized agent. An exception to this rule is provided for immovable property situated in a foreign country. 66/ This means that the Italian court of recognition (delibazione) will uphold the jurisdiction of the foreign court whenever it is based on one of these grounds. Two, when an agreement regarding a choice of forum in international contracts is concluded between foreigners or between foreigners and Italians who do not have their residence in Italy. 67/

It belongs to the party demanding recognition to prove that the foreign court had jurisdiction according to the Italian requirements. 68/

Right of Defense. The appearance and representation of the parties in the foreign court, including their absence or failure to appear or to be represented, must be considered according to the law of the foreign court. Nevertheless, cases arise in which a judgment is not granted recognition in Italy although the foreign court complied with its own rules. This occurs when the foreign decision was rendered either by default or in the absence of the defendant. In such cases article 798 of the Code of Civil Procedure

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66/ Code of Civil Procedure, art. 4(1).

67/ Id. art. 2.

68/ Supra note 44, at 99.

gives the defendant the right to ask the court of recognition to review the foreign judgment on its merits. The demand for review, if admitted, totally changes the character of the litigation from a recognition procedure (delibazione) to a regular court procedure which has the purpose of ascertaining the facts and the legal relations in terms of the Italian legal order. The court of appeal has jurisdiction, and the Italian procedural and substantive laws are applied. Apparently this "review is not limited to the review of the defendant's default or to the nature of his defense in the previous suit, but it implies a new and a substantial ascertainment with the possibility of a different decision on the merits: in such case the judgment of the court of appeal is essentially a second degree court decision." 69/

Other reasons for which a defendant may request review of a foreign decision are enumerated in article 395 of the Code of Civil Procedure. The request may be made when:

(i) fraud was committed by one party against another;

(ii) the judgment was based on evidence which proved to be inaccurate;

(iii) because of force majeure or the act of one party, a certain document could not be submitted to the court at the decisive time at the hearings;

(iv) the judgment relies on an error of fact resulting from the documents submitted in the case; or

(v) the foreign decision is the result of fraud committed by the judge which fact is determined by a judgment having the power of law. 70/

69/ Court of Appeal of Bari, Decision of January 29, 1954, Foro italiano 1954, V, 753.

70/ Supra note 66, art. 798.

The review of a foreign decision does not mean that the Italian court of appeal can change that decision according to its own findings. The court can only recognize the judgment as it is, or it can deny recognition. In the latter case, the court must decide the case on the merits. Any modification of a judgment is not possible because the review of a jurisdictional act cannot be undertaken except with respect to judgments within the same legal order.

Res Judicata. The foreign judgment must be final and conclusive according to the law of the place where it was rendered (lex fori). According to Italian interpretation, a decision becomes final either when all the regular means of appeal provided by the Code of Civil Procedure have been exhausted or when the time provided by law for an appeal has run. A similar acceptance is given to the res judicata by the legal systems of other civil law countries.

Non bis in idem. The foreign judgment must not be contrary to another judgment given by an Italian court. This provision of article 797(5) is not quite clear. Some scholars think that a foreign decision is contrary to the Italian one whenever the judgment decides a dispute on the same subject matter, even if it reaches the same result as the Italian decision. 71/

On the other hand, any action brought in an Italian court after a foreign judgment became final (res judicata) is stayed, and the foreign decision has priority. 72/ On the contrary, when an action is brought in an Italian court before the foreign judgment becomes final, the foreign decision

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71/ M. Cappelletti and J.M. Perillo, Civil Procedure in Italy 377 (The Hague, Nijhoff, 1965).

72/ G. Morelli, Il Diritto Processuale Civile Internazionale 301-302 (Padova, Cedam, 1938).

must be rejected. 73/ This could lead to avoiding or postponing the recognition of a foreign judgment by merely initiating a new suit in Italy before the foreign decision becomes res judicata. 74/

Lis alibi pendens. The Italian courts refuse to declare a foreign decision valid whenever another action is pending before either an Italian or a foreign court regarding the same parties and the same matter, and the Italian action was introduced before the foreign decision became final and conclusive (res judicata). This is sometimes criticized because it offers a party (usually the defendant) an opportunity to elude the intentions of the legislature by resorting to dilatory practices.

Public Order. In terms of article 797(7) of the Code of Civil Procedure, a foreign decision must not be contrary to Italian public order. This provision seems to complete those listed in article 797 regarding the protection of the individual's right to defense.

The concept of public order of the lex fori is upheld, but legal scholars emphasize that only the substance and not the form of the proceeding that led to a decision must conform to Italian concepts of public order. 75/ The fact that a foreign decision is based on foreign law does not constitute a reason for the refusal of its recognition. This would be the case even when, according to Italian law, an Italian judge would not be allowed to apply that law. 76/

73/ Supra note 66, art. 797(6).

74/ R. Monaco, Il Giudizio di Delibazione 98 (Padova, Cedam, 1940).

75/ Supra note 44, at 108.

76/ Supra note 73, at 345.

Finally, the fact that a judgment is in part contrary to Italian public order does not forbid the recognition and enforcement of its other parts which are not contrary to public order. 77/

Jurisdiction and Procedure. The court of appeal of the place where the foreign decision is to be enforced has jurisdiction concerning the validity of a judgment. 78/ In judgments concerning financial affairs, the court of appeal at the debtor's habitual residence has jurisdiction. Finally, if the claimant seeks the recognition and enforcement of a foreign judgment in more than one location in Italy, the court of appeal of the main place has jurisdiction for all of the others.

The judge must decline ex officio to examine a request for recognition when he discovers that his court does not have jurisdiction. Exceptionally, when the recognition of a foreign decision is not requested for the purpose of its enforcement in Italy, the parties can choose the jurisdiction of one court of appeal over another court of appeal but not over that of a court of a different level. 79/

The action is brought in court and all parties involved in the case are summoned or notified including those who may oppose the decision. The Italian Code of Civil Procedure also requires that the claimant must submit the authenticated foreign decision and other proofs. This action has to be

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77/ Court of Appeal of Aquila, Decision of June 19, 1928, Rivista di Diritto Internazionale 594 (Rome, 1929); c.f. supra note 44, at 102.

78/ Supra note 66, art. 798.

79/ R. Monaco, "L'efficacia delle sentenze straniere secondo il nuovo codice di procedura," Rivista di Diritto Internazionale 316, note 1 (Milan, 1941).

brought within ten years from the date the foreign judgment was decided. The law provides that the public prosecutor (pubblico ministero) must participate as a party to these proceedings since Italian public order is involved.

E. THE NETHERLANDS

1. Legal Sources

Articles 431 and 985-994 of the Code of Civil Procedure regulate the recognition and enforcement of foreign judgments in the Netherlands. To a certain extent judiciary practice is also of importance. Article 431 expressly forbids the enforcement of any foreign judgment, except those referred to in articles 985-994 of the Code of Civil Procedure. This article also suggests that such foreign cases may be retried in the Dutch courts. In view of this, the conclusion of a bilateral convention providing for a reciprocal enforcement of judgments seems to be a recommended step.

2. Requirements of Recognition

Articles 985-994 of the Code of Civil Procedure provide the conditions and the methods by which the Dutch courts may grant recognition to a foreign judgment "by virtue of a convention" between the Netherlands and the country where the respective decision was rendered. In such cases the court of the district where the defendant resides and that of the district in which enforcement is requested have jurisdiction. The parties must be properly summoned. The decision of enforcement must give reasons and is declared in open court.

Since, in the absence of a treaty, the enforcement of a foreign judgment is practically impossible in the Netherlands, the courts, particularly the Supreme Court (Hoge Raad), have developed a judiciary practice which attempts to supplement statutory law.

Choice of Forum. An important break in tradition has occurred in the field which concerns those international contracts where the parties, one of whom is either Dutch or has property in the Netherlands, have submitted their disputes for settlement to a foreign court. The interpretation given by the Dutch courts to a foreign judgment adverse to the Dutch party is based on the reasoning that a foreign judgment cannot be enforced without a treaty expressly providing for this kind of judgment. However, in cases concerning international contracts, when the parties by virtue of their agreement have chosen a foreign court (choice of forum), the Dutch party is obliged to perform the contract bona fide according to articles 1374 and 1375 of the Civil Code of the Netherlands. If for some reason the Dutch litigant does not perform it bona fide and the chosen foreign court renders a judgment against him, the bona fide rule obliges the litigant to comply with the judgment of that court. A Supreme Court decision held that the clause of the contracting parties' agreement to choose the foreign court implied a duty to comply with the foreign judgment. 80/ Today it is an established practice that in such cases the Dutch courts examine only whether the foreign court which rendered the decision was chosen by the parties and whether the procedure followed by that court was equitable. 81/

Doctrine of Tacit Submission. As a result of choice of forum agreements, the Dutch courts have developed a practice whereby any tacit or voluntary submission to a foreign court's jurisdiction is implicitly binding upon that person, and he must comply with the judgment rendered by that

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80/ Hoge Raad [H.R.] Decision of January 31, 1919, in Nederlandse Jurisprudentie [N.J.] [Dutch Case Law]; see also, D. Kollewijn, American-Dutch Private International Law 35, note 119 (New York, Oceana, 1961).

81/ H.R. Decision of April 26, 1918, in N.J. 1918 587; see also, id. Kollewijn.

court. In such cases the Dutch courts scrutinize whether a contract was made by the parties. However, this approach has been criticized by Dutch legal scholars as an escape device which, under current conditions, constitutes a real obstacle to more subtle developments in this field. 82/ On the other hand, the tendency of some courts to expand the presumption of tacit submission to include cases where the defendant appears before a foreign court only to contest its jurisdiction has been criticized. An example of such an interpretation was offered by the Court of The Hague in a case involving the enforcement of a French decision:

> A foreign judgment binds the parties if they submit to the jurisdiction of a foreign judge; the defendant submitted to the jurisdiction of the Court of Cannes by proceeding to plead to the merits after his objection to its jurisdiction was overruled (as he now realizes). 83/

Competent Jurisdiction. Decisions rendered in the last fifty years provide further interpretation of the Dutch Supreme Court initial decision in this field. At present, any foreign decision rendered by a competent judge may be recognized in the Netherlands. Unfortunately, the Dutch courts have failed to specify which criteria are being used to determine whether the foreign court had jurisdiction. 84/

82/ D. Kokkini-Iatridou and J.P. Varheul, "Les effets des jugements et sentences étrangers aux Pays-Bas," Netherlands Reports to the VIIIth International Congress of Comparative Law, Pescara 137 (Kluwer-Deventer, 1970).

83/ Id. at 138.

84/ Id. at 139.

F. SWITZERLAND

1. Legal Sources

In the terms of Article 64, paragraph 3, of the Swiss Constitution, "the organization of the courts, their procedure and jurisdiction shall remain a matter for the cantons." Consequently, almost every canton has regulations concerning recognition and enforcement of foreign judgments in its law or code of civil procedure. However, a major limitation is imposed in Article 59 of the Constitution which requires foreign creditors to sue for personal debts a solvent debtor domiciled in Switzerland in the court of his domicile because "his property may not be seized or attached for personal claims outside the canton in which he has his domicile." This means that the court of the debtor's domicile (forum aresti) has exclusive jurisdiction in the enforcement of a foreign money judgment.

2. Cantonal Regulations

In the absence of either a federal law or an international agreement, the law of the canton where the foreign judgment has to be enforced must be applied. Most of the cantonal laws regulate only the enforcement of judgments, while the recognition of these judgments is presumed to be included in the recognition decision. Some cantonal laws, such as the Glaris Law of Civil Procedure, do not contain provisions that would provide for the enforcement of foreign judgments. As a result of this omission, some scholars are of the opinion that recognition was not obtainable in such a canton. It means that a new suit must be brought in Glaris. 85/ Other cantons, including Bâle Campagne (the Code of Civil Procedure (art. 286)), leave the enforcement of

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85/ M. Petitpierre, La reconnaissance et l'exécution des jugements civils étrangers en Suisse 32 (Paris, Librairie Générale de Droit et de Jurisprudence, 1925).

judgments to international agreements and federal legislation. In Obwald Canton, the law (art. 246) makes recognition depend on international agreements and is understood to mean that in the absence of an international agreement cantonal courts may not grant recognition. 86/

In spite of this diversity, most of the cantonal laws provide for recognition of foreign judgments. In general, the conditions required expressly or tacitly by the cantonal legislation for granting recognition may be summarized as follows:

-- The foreign judgment must be final and conclusive (res judicata). This is required by article 401(1) of the Code of Civil Procedure of Canton Bern, article 463(3) of the Geneva Code of Civil Procedure, article 504(b) of the Neuchâtel Code of Civil Procedure, and section 377 of the Zürich Law of Civil Procedure.

A judgment becomes res judicata when it cannot be challenged either because the means of appeal were fully exhausted or the claimant did not appeal in time or in accordance with the rules provided by law. 87/ A final decision cannot be modified either by the judge who rendered it or by any other court. 88/

86/ Id.

87/ J. Graven, "Le principe de la chose jugée et son application en procédure civile suisse," in Etudes de droit commercial en l'honneur de Paul Carry 226 (Genève, George Librairie de l'Université, 1964).

88/ Id. at 231.

-- The foreign court must have jurisdiction under Swiss law. 89/ For example, a foreign court is never considered to have jurisdiction in matters of money, if the defendant is domiciled in Switzerland (Art. 59, Constitution). In some cantons, such as Zürich and Schwyz, the foreign court is required to have jurisdiction under both the Swiss law and its own law. In Canton Schaffhausen a negative test of jurisdiction is applied. Legal scholars are of the opinion that the international jurisdiction of a foreign court must be considered according to Swiss conflict rules. The review of the internal jurisdiction of courts should be limited to finding whether a jurisdictional defect could have the effect of nonenforcement of the judgment, even in the country of its origin. Scholars believe in such a case that a foreign decision should not be enforced in Switzerland. 90/

Public Order. The foreign decision must not violate Swiss public order. Most of the cantonal codes of civil procedure contain express provisions in this matter (see, for example, Geneva, art. 463(4); Bern, art. 401(4)).

According to the Swiss Federal Court, a foreign judgment is contrary to the public order when it contradicts the fundamental concept of law generally accepted in Switzerland or when it violates the fundamental rules on which Swiss law is based. 91/

89/ J. Thorens, "L'exequatur des jugements et sentences," in Recueil des travaux suisses présentés au VIIIe Congrès international de droit comparé 174 (Basel, Helbing & Lichtenhan, 1970).

90/ C. Perin, "L'exécution des jugements étrangers en Suisse," 84 Recueil Penant, Revue de droit des pays d'Afrique 58 (1974).

91/ Swiss Federal Tribunal, Decision of October 28, 1970, Journal des Tribunaux, part I. Droit Fédéral, at 539-540 (case H.v.M. and Zürich, 1970).

Right of Defense. The fact that the foreign court did not observe the fundamental principles of procedure concerning the right of defense is considered by some scholars to fall within the requirement of Swiss public order. 92/ The cantonal laws, however, have separate provisions on each of these two requirements (see: Bern, art. 401(3); Geneva, art. 463(4), Code of Civil Procedure).

Reciprocity. The rule that a foreign judgment cannot be enforced in Switzerland if the respective foreign country does not enforce Swiss judgments is deeply rooted in cantonal practice. Therefore, most of the cantonal regulations require reciprocity (see: Argovie, art. 378, Code of Civil Procedure; Bâle-Ville, art. 258, Code of Civil Procedure; Fribourg, art. 236, Code of Civil Procedure; Geneva, art. 463, Code of Civil Procedure; Tessin, art. 511, Code of Civil Procedure; Valais, art. 383, Code of Civil Procedure). In other cantons reciprocity is not required, but the law gives the court the option to refuse recognition because of a lack of reciprocity with the country in which the decision was rendered (see: Schwyz, art. 230, Code of Civil Procedure; Vaud, art. 507, Code of Civil Procedure; Zürich, art. 302, Code of Civil Procedure). The governments of the Cantons of Bern (art. 401, Code of Civil Procedure), Jura (art. 394, Code of Civil Procedure), and Soleure (art. 323, Code of Civil Procedure) can refuse recognition for reasons of reciprocity. Finally, the cantons of Grisons (art. 291, Code of Civil Procedure), Neuchâtel (art. 505, Code of Civil Procedure), and Schaffhausen (art. 400, Code of Civil Procedure) do not require reciprocity as a condition of enforcement of foreign judgments.

92/ Supra note 90, at 174.

Jurisdiction and Procedure. Cantonal laws may require the employment of a local lawyer in the enforcement of a foreign judgment, and a list of the cantonal lawyers can be obtained from any Swiss consulate.

The cantonal jurisdiction referred to in Article 64(3) of the Federal Constitution is understood to extend to the limits set by federal law and international agreements concluded by Switzerland with other countries. By provision of Article 64(1) of the Constitution, the Confederation has the authority to legislate in matters of debt collection and bankruptcy. However, Swiss legal scholars are of the opinion that this provision does not extend to the regulation, recognition, and enforcement of such foreign judgments. 93/ Consequently, the legislature has left these matters to the cantons. 94/ Foreign judgments are enforceable if they are recognized by Swiss law or by international agreements to which Switzerland is a contracting party. In their absence, a special recognition procedure is necessary for their enforcement. It is a procedure which gives the defendant an opportunity to give reasons for denying recognition.

The jurisdiction is vested in the cantonal court in which the foreign judgment is to be enforced.

III. RECOGNITION AND ENFORCEMENT OF JUDGMENTS IN THE SOCIALIST COUNTRIES

Foreign trade in the socialist countries is conducted on a contractual basis by special state enterprises. As a rule, any disputes arising from trade contracts are submitted to commercial arbitration and not to the courts. This may explain the absence of a broad multilateral convention among the socialist countries that would resemble the EEC Convention of 1968.

93/ Id. at 172.

94/ W.J. Habscheid, Droit judiciaire privé suisse 335 (Genève, George Librafrie de L'Université, 1981).

Instead, in 1972 these countries concluded a Convention on Settlement by Arbitration of Civil Law Disputes Resulting from Economic, Scientific and Technical Cooperation, in force since August 13, 1973, 95/ which contains provisions on enforcement of arbitral awards.

In the field of legal assistance, including the enforcement of foreign judgments, the socialist countries prefer to enter into bilateral agreements within their own community of nations. Thus, during the last three decades all of them have concluded such conventions on legal assistance in civil and criminal matters which also include provisions on reciprocal recognition and enforcement of judgments. During the last decade, however, the socialist countries have also begun to enter into this type of convention with European free-market countries. At present, the following socialist countries have bilateral conventions on legal cooperation with France: Bulgaria, March 27, 1976; Poland, April 5, 1967; Romania, November 5, 1974; and Yugoslavia, May 18, 1971. The following have this type of convention with Austria: Czechoslovakia, November 10, 1961; Poland, December 11, 1963; Hungary, April 9, 1965; Romania, November 17, 1965; and Bulgaria, October 20, 1967. 96/

Most of these special agreements list the following requirements for the recognition and enforcement of judgments: (a) the decision must be res judicata and enforceable in the country of origin; (b) the court must have had jurisdiction to decide the case; (c) the right of defense must have been respected; (d) the decision must not be contrary to the public order of

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95/ 13 International Legal Materials 5-12 (1974).

96/ J. Jodlowski, "Les conventions relatives à la cooperation judiciaire en matière civile et commerciale entre les états socialistes et les états occidentaux," 158 Recueil des Cours de l'Académie de Droit International de la Haye 331 (1977).

the requested country; (e) the courts of the requested country (sometimes other countries) must not have rendered a decision on the same matter (non bis in idem); (f) no action in the same matter can be brought in a court of the requested country (lis alibi pendens); (g) in terms of the conflict rules of the requested country, the foreign court applied the proper substantive law. 97/ These are the standard requirements for enforcement that are being applied failing international agreements.

A. SOVIET UNION

Article 63 of the Fundamentals of Civil Legislation provides that "the procedure of execution of foreign courts' judgments or foreign awards in the Soviet Union is determined by the corresponding conventions of the U.S.S.R. with foreign countries or by international conventions to which the U.S.S.R. is a party."

Examining this provision in context with the enforcement of foreign arbitral awards, Soviet legal scholars have reached the conclusion that " in the absence of international treaty provisions applicable to a particular foreign arbitral award its enforcement in the Soviet Union would be subject to reciprocity and as such would be problematic." 98/

The same rule seems to be applied, mutatis mutandis, to the enforcement of foreign judgments for at least two reasons:

(1) In the absence of a choice of forum, the basic rule of jurisdiction applied in the Soviet Union is that of the defendant's domicile. This rule has the advantage of protecting the Soviet enterprise engaged in foreign

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97/ Id. at 340.

98/ S.N. Lebedev, Mezhdunarodnoe Sotrudnichestvo v Oblasti Kommercheskogo Arbitrazha [International Cooperation in Commercial Arbitration] 52 (Moscow, USSR Chamber of Commerce and Industry, 1979).

trade whenever, for some reason, the enterprise does not choose a forum to settle the dispute with a foreign partner, and the enterprise is in default in performing a contract. The foreign partner has no other forum but the Soviet court of domicile of the Soviet enterprise.

(2) In the field of choice of forum, socialist doctrine recognizes that the party's right to choose the competent court is limited exclusively to those cases where Soviet law also allows the parties to choose a foreign substantive law, namely in contracts of foreign trade (art. 126, Principles of Civil Legislation of the U.S.S.R. and of the Federal Republics). Consequently, scholars consider party autonomy applicable in these two cases--of law and choice of forum--since it has the same purpose of creating favorable conditions for the development of Soviet trade. 99/ Their view is that a choice-of-forum agreement in favor of a foreign court can be concluded only by a Soviet trade entity and only if the matter deals with litigation resulting from a foreign trade contract. 100/ As a consequence, Soviet courts will not enforce the judgment of a foreign chosen court rendered in a case based on private international contracts concluded by individuals in their private capacity. The Soviet courts will enforce only those foreign decisions and awards regarding their foreign trade enterprises and only if an international agreement on this matter is applicable between the Soviet Union and the respective foreign country. In a practical sense, this means that in

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99/ J. Jodlowski, "Les conventions relatives à la prorogation et à la dérogation à la compétence internationale en matière civile," 143 Recueil des Cours de l'Académie de Droit International de la Haye 519 (1974).

100/ Id.

the absence of an international agreement, the Soviet Union does not follow the traditional European practice of recognition and enforcement of foreign judgments.

B. CZECHOSLOVAKIA

1. Legal Sources

The major provisions on recognition and enforcement of foreign judgments appear in the Statute of December 4, 1963, Concerning Private International Law and the Rules of Procedure Relating Thereto. 101/ In promulgating this Statute, Czechoslovakia became the first socialist country to adopt special rules on international civil procedure. They are, in some respects, implemented by domestic rules of procedure, particularly on the jurisdiction of Czechoslovak courts, the rights of a defendant in the recognition procedure, appeal, and the enforcement itself.

Unlike the Soviet law, the Czechoslovak Statute of 1963 announces, as a basic rule, that foreign judgments "shall have legal effect in the Czechoslovak Socialist Republic, if they have become final according to an affidavit of the respective foreign authority and if they have been recognized by the Czechoslovak authorities." 102/

The Statute deals separately with final foreign decisions in matters of matrimony and paternity, and a final foreign decision will be recognized when at least one of the parties is a Czechoslovak citizen. 103/ However, when all the parties involved in a case are citizens of a foreign

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101/ 21 Bulletin of Czechoslovak Law 251 (1963).

102/ Sec. 63.

103/ Sec. 67(1).

country, the decision is recognized in Czechoslovakia without further proceedings unless it is contrary to public order. 104/ The Statute grants the same legal effect to decisions of other foreign countries under the above-mentioned conditions, if such decisions are fully recognized in the home states of all the parties involved.

2. Requirements of Recognition

Beside the requirement of being a res judicata in terms of the law of forum, a foreign judgment cannot be recognized and enforced:

-- If the Czechoslovak courts or authorities have an exclusive jurisdiction (competence) in the respective case; or if, in terms of Czechoslovak rules of procedure, certain proceedings carried out by an organ of that foreign country cannot be legitimately performed as such. For example, according to article 45 of the Statute of 1963, the office of the Czechoslovak State Notary Public must probate the estate of a deceased alien (decuius) when the individual maintained his domicile and owned property in that country. Consequently, in such a case any decision taken by a foreign court regarding this estate would not be recognized. 105/

-- If the Czechoslovak court rendered a final decision in the same matter, or if a decision rendered by the court of a foreign country was recognized in Czechoslovakia.

The Statute does not specify whether, in such cases, the decision of the Czechoslovak court must be rendered after that of the foreign court. According to one writer, the decisive moment is the time when the request for

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104/ Sec. 68(1).

105/ M. Kotora, "La reconnaissance et l'exécution des décisions en matière patrimonale et des sentences arbitrales étrangères dans la République Socialiste Tchécoslovaque," 11 Il diritto degli scambi internazionali 32 (1972).

recognition is filed in Czechoslovakia, not when the decision was rendered by the foreign court. Consequently, to deny recognition, "it is enough that a Czechoslovak decision has already become res judicata, even if this decision was given after the one rendered by the foreign court." 106/

-- If the foreign court deprived the defendant of his right to defense, particularly by not serving him with a summons. 107/

-- If the recognition and enforcement is contrary to Czechoslovak public order. 108/

-- If there is no reciprocity in this matter between the two countries. However, reciprocity is not required when the enforcement of a foreign judgment does not concern Czechoslovak citizens or legal entities. 109/ In a case where the court cannot determine that reciprocity has been accorded by a certain country in a certain matter, the judge has to ask the advice of the Justice Department. Once given, this advice is binding on the Czechoslovak court. 110/ Since reciprocity is required in all Czechoslovak international agreements, it seems to play an important part in granting recognition to judgments rendered by the courts of countries with which Czechoslovakia has no such agreements. It appears, therefore, that "the territorial doctrine expressed by sections 56 and 63-66 of the Statute..., by virtue of which any foreign decision should be recognized, regardless of its country of

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106/ Id.

107/ Id. at 33.

108/ Sec. 64(d).

109/ Sec. 64(e).

110/ Sec. 53.

origin, is not of universal application." 111/ The Arbitration Court of the Czechoslovak Chamber of Commerce recently held, with respect to section 63, that the "decisions of foreign jurisdictions have no direct, automatic, and extraterritorial impact in Czechoslovakia, unless recognized by the respective Czechoslovak authorities." 112/ In this regard, one of the prerequisites for recognition of a foreign judgment and its enforcement is the principle of reciprocity. But "such reciprocal treatment need not be provided for in an international treaty or convention; the simple fact that Czechoslovak judgments--even without a treaty--are enforceable in a foreign country would be sufficient." 113/

Jurisdiction and Procedure. The recognition procedure appears in the Code of Civil Procedure together with provisions on the enforcement of domestic decisions. As a rule, the Code "permits the issuance of a writ of execution only if the respective claim or right has been proven to the court." 114/ The documents submitted to the court to prove the claim are called "execution titles."

In the terms of section 252 of the Code of Civil Procedure, "the proper court to order and carry out the execution of a decision is the court of general jurisdiction of the obligated party, or the court within whose jurisdiction the obligated party has his property, if he has no domicile or residence in Czechoslovakia." If the execution is concerned with immovable

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111/ Supra note 106, at 44.

112/ Award of January 18, 1980, Case No. PSP 57/78, in 6 Yearbook, Commercial Arbitration 172 (1981).

113/ Id. at 128.

114/ J. Macur, "Execution Proceedings," 15 Bulletin of Czechoslovak Law 52 (1976).

property, the court within whose jurisdiction this property is situated has jurisdiction. 115/ Finally, in enforcement of child support cases, the court where the child resides has jurisdiction. 116/

If the defendant does not voluntarily comply with the decision, the judge, at the request of the claimant, can issue a writ of execution. To obtain this writ, the claimant has to attach a copy of the foreign decision together with a certificate of its enforceability and specify the manner in which he wants to have the decision executed. 117/ Money judgments are enforced by garnishment of wages, the assignment of claims, or the sale of property both movable and immovable. Decisions imposing other obligations on the defendant are enforced according to their nature. In a case where the defendant is insolvent, the liquidation of his property may be ordered. 118/

C. POLAND

1. Legal Sources

Quite unlike the Czechoslovak Statute of 1963, the Polish Law of November 12, 1965, on Private International Law 119/ does not have any provision concerning international civil procedure. Instead, the Polish legislature has followed the Soviet Union's example and deals with civil procedure in Book III (arts. 1145-1153) of the Code of Civil Procedure of November 17, 1964. 120/

115/ Sec. 252(3).

116/ Sec. 252(4).

117/ Sec. 261(1) and (2).

118/ Sec. 258(1), (2), and (3).

119/ 7-8 Droit polonais contemporain 79 (1967).

120/ 59 Revue critique de droit international privé 344-355 (1970).

2. Requirements of Recognition

The Code distinguishes between the concepts of recognition and enforcement of foreign judgments. Moreover, within the concept of recognition itself, the Code has different rules according to the type of foreign judgment to be recognized.

Special Recognition. A de jure recognition is granted to a certain category of foreign decisions which do not concern Polish citizens or interests. The legal effects of a foreign judgment in Poland are recognized without the necessity of any recognition proceedings under the following conditions:

(i) it must be enforceable in the foreign country;

(ii) it involves a foreigner rather than a Polish citizen;

(iii) it was rendered by a court which had jurisdiction according to the national law of the parties in dispute;

(iv) it does not deal with property;

(v) it is not intended to serve as a legal basis for the conclusion of a marriage, or a recording in a register of civil status, land register, or any other official register in Poland; and

(vi) it is not contrary to the fundamental principles of Polish public order. 121/

General Recognition. Foreign judgments, which may affect Polish citizens, may be recognized on reciprocity if:

(i) the decision is res judicata in the country where it was rendered;

121/ Art. 1146(4).

(ii) according to Polish law or to an international agreement, the matter in dispute does not come under the exclusive jurisdiction of Polish courts or of a third country's court;

(iii) the party was not deprived of his right of defense nor of the right to receive legal assistance from a qualified person acting on his behalf;

(iv) the case was not finally adjudicated or pending in a Polish court before the decision became res judicata;

(v) the foreign decision is not contrary to the basic principles of Polish legal order; and

(vi) the judgment was based on foreign law in a dispute in which the Polish law should have been applied but the outcome did not differ substantially from Polish law.

In general, reciprocity is not required if according to Polish law the foreign court had an exclusive jurisdiction. On the other hand, compliance with the principles of res judicata and lis alibi pendens referred to at (4) above, as well as with the general requirement of reciprocity, is not demanded in case of inheritance of property located in a foreign country by a person domiciled in Poland if the decision conforms with the law of that country.

Enforcement of Judgments. Article 1150(1) of the Polish Code of Civil Procedure closely follows the practice in the Soviet Union. Foreign judgments are enforced in Poland only if an international agreement in force between Poland and the respective foreign country provides for their recognition. Foreign judgments dealing with family relations are the only exception. 122/

122/ J. Jodlowski, "Recognition and Enforcement of Foreign Judgments in

Failing an international agreement, a foreign plaintiff has to bring a new suit in the court of the Polish defendant's domicile.

When an international agreement is in force between Poland and a foreign country, it takes precedence over the provisions of the Polish Code of Civil Procedure. 123/

If an international agreement does not provide for enforcement, the foreign judgments will be enforced in Poland if:

(i) the decision was rendered after the date the international agreement entered into force;

(ii) the decision is enforceable in the respective foreign country;

(iii) the six conditions provided by article 1146(1) for the recognition of foreign judgments on the basis of reciprocity, listed above, are fulfilled, namely:

a) the foreign decision is final and enforceable in the country where it was rendered;

b) according to Polish law or to an international convention, the matter in dispute is not under the exclusive jurisdiction of Polish courts or of a third country's courts;

c) the defendant was not deprived of his right to defense;

d) the case was not finally adjudicated (non bis in dem) or pending in a Polish court before the foreign decision became enforceable (lis alibi pendens);

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the Polish People's Republic," 9 Polish Yearbook of International Law 210; see also, art. 1150(3) Code of Civil Procedure.

123/ Supreme Court, Decision of December 7, 1973; c.f. supra note 123, at 212.

(e) the foreign decision is not contrary to the basic principles of Polish legal order; and

(f) the judgment was based on foreign law in a dispute in which the Polish law shall have been applied but the outcome did not differ substantially from Polish law.

Jurisdiction and Procedure. A request for the recognition and enforcement of a judgment can be submitted by any person who has a legal interest in it. 124/ The plaintiff has to attach an official copy of the foreign judgment, its certified translation in the Polish language, and a court certificate or proof attesting that the judgment is enforceable (res judicata). When the judgment is rendered by default, another certificate attesting that the defendant was properly served or notified must be included. 125/

The court of the first grade of jurisdiction or the provincial court of appeal of the domicile or residence of the debtor retains jurisdiction. 126/ The hearing is public, and the decision can be challenged by a petition for its revision. If it becomes res judicata, the same provincial court enforces the decision. 127/

124/ Art. 1147(1).

125/ Art. 1147(2).

126/ Art. 1151(1).

127/ Art. 1151(3).

D. ROMANIA

1. Legal Sources

Article 375 of the Romanian Code of Civil Procedure of March 15, 1900, 128/ is the only legislative source in the field of enforcement of foreign judgments in the country. Its provisions have, however, been supplemented by Supreme Court decisions rendered before and after World War II, and by studies of legal scholars which are valuable sources for its interpretation. In spite of many deep legislative changes in Romania, article 375 has remained in force for over eight decades.

The basic solutions provided by article 375, unlike those of the Polish Code of Civil Procedure of 1962, do not follow the Soviet Union's rigid treatment of enforcing foreign judgments. Thus, the Romanian Code does not limit the enforcement of foreign judgments to decisions rendered by the courts of those countries with which Romania has international conventions in this matter. Also, the requirement of reciprocity receives broad interpretation.

2. Requirements of Recognition

In the light of article 375 of the Code of Civil Procedure, the enforcement of a foreign court decision depends on the compliance with the following four requirements:

International Jurisdiction. A foreign judgment must be rendered by a competent court. Legal scholars seem to agree that a Romanian court can verify the international jurisdiction of the foreign court. They are of the opinion that a foreign court must have assured itself of having international

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128/ Decree 1228/1900, Monitorul Oficial of March 15, 1900, republished according to Law No. 18 of February 12, 1948.

jurisdiction, but the decision may infringe upon the exclusive jurisdiction of a Romanian court. Consequently, a Romanian court of recognition must look into the matter. 129/

Matters regarding the exclusive jurisdiction of a Romanian court are governed by article 5, final paragraph, and article 607 of the Code of Civil Procedure. The Supreme Court held in this connection that in cases involving a foreign element, the court must apply the provisions of the Romanian legislation of territorial jurisdiction. 130/

The general rule of jurisdiction is based on auctor sequitur forum rei. There are three exceptions to this rule. One deals with alternative jurisdiction in matters of maintenance and alimony which are subject to the jurisdiction of the court of the plaintiff's domicile (art. 10(7), Code of Civil Procedure). The second concerns exclusive jurisdiction since immovables and successions located in Romania are subject to the jurisdiction of the court of the place of their location (arts. 13 and 14, Code of Civil Procedure). The third concerns divorce and provides that the court of the last domicile of the spouses will have jurisdiction (art. 607, Code of Civil Procedure). If the spouses do not have a common domicile, including a case where the defendant resides in a foreign country or where neither of the spouses lives in the place of their former common domicile, the court of the plaintiff's residence has jurisdiction. 131/

129/ O. Capatina and D. Ianculescu, "La solution des questions de compétence internationale en instance d'exequatur," 24 Revue roumaine des sciences sociales, série de sciences juridiques 216-217 (1980).

130/ Supreme Court, Civ. Ch., Decision no. 1653 of October 2, 1971; c.f. Capatina and Ianculescu, id.

131/ Arts. 607 and 5, Code of Civil Procedure.

In conclusion, the verification of a foreign court's international jurisdiction is performed by the Romanian court of recognition in an indirect manner and has a limited character. The foreign court is denied international jurisdiction only when it infringes upon the area of exclusive jurisdiction of a Romanian court.

Res Judicata. The foreign court decision is enforceable according to the law of the respective foreign country, but the lex fori governs the nature and the legal effects of a foreign judgment. This means that a decision which can still be appealed according to the law of the country in which it was rendered cannot be enforced in Romania. Some Romanian legal scholars are of the incorrect opinion that to become res judicata, the court decision must be communicated to the party himself by his attorney. 132/ It is well established, however, that these problems concern the individual's right of defense. Therefore, they should be treated either under the right of defense or under the concept of public order. To place such procedural issues within the concept of res judicata would unduly interfere with the foreign court's application of its rules of procedure.

Public Order. Following the practice common to other legal systems, Romanian law does not define the concept of public order. Romanian legal scholars consider it a part of a general international public order, although they recognize a difference between the notion of international and domestic public order. Thus, while the domestic public order rejects any act contrary to the mandatory provisions of law, the international public order, as referred to in article 375 of the Code of Civil Procedure "is limited

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132/ O. Capatina and S. Zilberstein, "La reconnaissance et l'exécution des décisions judiciaires et des sentences arbitrales étrangères dans le droit de la République Socialiste de Roumanie," 16 Revue roumaine des sciences sociales, série de sciences juridiques 289 (1972).

exclusively to the protection of those mandatory provisions of the domestic law which are essential for the social and political system" of Romania. 133/ In effect, the application of a foreign law should be denied only when the judge compares applicable Romanian and foreign laws and reaches the conclusion that the foreign legal provisions are so different that their application would be impossible.

Some scholars have attempted to enumerate the problems which may require the application of the exception of public order for refusing the enforcement of a foreign decision. Included are examples from international jurisdiction, the violation of the right of defense, regularity of procedure, and fraud. The legal profession recognizes, however, that in spite of this desire to have an enumeration of these problems, "public order still remains a concept which defies exhaustive definition." 134/

Reciprocity. The last requirement of article 375 of the Code of Civil Procedure is reciprocity between the country of origin of the foreign judgment and Romania. In practice, the Romanian courts do not require reciprocity based on an international agreement or provided expressly by the laws of a foreign jurisdiction. The courts are satisfied with a reciprocity of fact, which in essence means that the Romanian judgments must be given

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133/ O. Capatina, Efectele hotărîrilor judecătorești străine în România 126 (Editura Academiei Republicii Socialiste România, 1971).

134/ I. Filipescu and M. Jacota, Drept international privat 68 (București, Editura didactică și pedagogică, 1968).

equal treatment. They must be recognized as res judicata and held enforceable by the courts of the other country. 135/ The requirement of reciprocity must be fulfilled when recognition is requested in a Romanian court. 136/

Jurisdiction and Procedure. Apart from the fulfillment of the conditions of recognition and enforcement, a foreign decision will not be executed unless the court of first jurisdiction (People's Court) of the defendant's domicile grants the foreign judgment the necessary executory power or title in Romania. 137/

Only those decisions which are res judicata in the respective foreign country are granted execution. If none of the parties is domiciled in Romania, the court of the first grade of the judiciary area of Bucharest has jurisdiction. This is expressly provided in the Code (People's Court of the judiciary area "Tudor Vladimirescu" in Bucharest). A petition requesting enforcement is also submitted to the same court. A foreign judgment, after it is declared enforceable in Romania by the court, is enforced by the auxiliary personnel of the respective court or by other authorities expressly requested by the court to perform the task.

135/ Supra note 134, at 138-141.

136/ Id. at 142.

137/ Art. 376(3), Code of Civil Procedure.

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